Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 703(e)	)	CS Docket No. 97-151
of the Telecommunications Act of 1996	)	

COMMENTS OF U S WEST, INC.

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September 26, 1997

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U S WEST, Inc. ("U S WEST"), through counsel and pursuant to the Federal Communications Commission's ("Commission") Notice of Proposed Rule Making,[1] hereby files its comments on proposed changes in the Commission's rules to govern the rates that utilities may charge telecommunications carriers providing telecommunications services for pole and conduit attachments ("pole attachments").[2]

I. INTRODUCTION AND SUMMARY

In its comments in the Commission's proceeding on pole attachments for cable companies,[3] U S WEST advocated the following positions:

- it opposed proposed modifications contained in the Electric Utilities' Whitepaper;

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[1] In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, Notice of Proposed Rule Making, FCC 97-234, rel. Aug, 12, 1997 ("Notice").

[2] U S WEST's comments represent the integrated position of U S WEST Communications, Inc., one of the largest local exchange carriers ("LEC") and MediaOne, the third largest cable television distributor in the United States.

[3] In the Matter of Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rule Making, 12 FCC Rcd. 7449 (1997) ("Pole Attachment NPRM").

- it supported the Commission's proposal to remove the effect of negative net salvage;
- it supported continued use of private contracts for pole and conduit rental arrangements;
- it supported use of net book costs in determining maximum pole attachment rates; and
- it opposed the use of a single formula for determining conduit rates within a study area.[4]

U S WEST hereby incorporates these comments by reference in its comments in this proceeding.[5] U S WEST's comments in the instant proceeding are consistent with its earlier comments.

In the instant proceeding, the Commission proposes to adopt rules implementing Section 224(e) of the Act which was added by the Telecommunications Act of 1996. The Commission's action is timely and will help clarify the different pricing rules which apply to both cable companies and telecommunications carriers as we approach February 8, 2001, when the phase-in of new rates for entities providing telecommunications services begins. As an initial matter, U S WEST urges the Commission to confirm that Section 224(d) governs pole attachment rates for cable systems providing non-video communications, other than telecommunications service, rather than Section 224(e).

Section 224(e)(2) and (e)(3) distinguish between the apportionment of pole and conduit costs for usable and nonusable space. With one exception, U S WEST

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[4] Comments of U S WEST, CS Docket No. 97-98, filed June 27, 1997, attached hereto as Attachment 1; Reply Comments of U S WEST, CS Docket No. 97-98, filed Aug. 11, 1997, attached hereto as Attachment 2.

[5] Notice ¶ 8. See Attachments 1 and 2.

supports the Commission's proposed apportionment of the costs of usable space to telecommunications carriers -- which is consistent with the Commission's earlier proposals for cable companies.[6] That is, U S WEST opposes the use of a single formula for determining the cost of conduit space within a study area and advocates using a methodology that recognizes geographic cost variations in conduit systems (i.e., between very expensive downtown areas, other urban/suburban areas, and rural areas). As to nonusable space, U S WEST finds the Commission's proposed apportionment of nonusable space to be unfair to owners of poles and conduit and at odds with the plain language of Section 224(e)(2) of the Act.[7]

U S WEST does not oppose the overlashing of existing lines by attaching entities. This in no way implies that it is an acceptable practice to allow unrelated third parties to overlash the facilities of attaching entities. Lastly, U S WEST believes that right-of-way complaints should be resolved on a case-by-case basis due to the wide variety of circumstances under which rights-of-way are acquired by utilities.

II. CABLE TELEVISION SYSTEMS PROVIDING NON-VIDEO COMMUNICATIONS, OTHER THAN TELECOMMUNICATIONS SERVICE, ARE NOT TELECOMMUNICATIONS PROVIDERS SUBJECT TO THE PROVISIONS OF SECTION 224(e)

The Telecommunications Act of 1996 contains two different methods for determining just and reasonable pole attachment rates.[8] Section 224(d) applies to

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[6] See Pole Attachment NPRM, 12 FCC Rcd. 7449.

[7] 47 U.S.C. § 224(e)(2).

[8] Utilities also have an obligation pursuant to Section 224(f)(1), to provide nondiscriminatory access to poles and conduit. This requirement includes more than providing pole attachments at just and reasonable rates. As is made clear by

rates for any pole attachment "used by a cable television system solely to provide cable service"[9] while Section 224(e) applies to pole attachments "used by telecommunications carriers to provide telecommunications services."[10] These provisions of the Act appear to limit the Commission's earlier holding in Heritage.[11]

In the Heritage case, which dealt with a cable operator's delivery of traditional and nontraditional cable services over a broadband network, the Commission found that "a utility may not charge different pole attachment rates depending on the type of service provided by the cable operator."[12] The Commission should confirm that Heritage remains good law in situations involving only the delivery of cable services over an integrated network. For example, U S WEST MediaOne and other cable operators offer cable modem service which permits subscribers to access the Internet. These services are not "telecommunications services" and are not subject to regulation under Title II of the Act. The

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the Commission's decision in Marcus Cable Associates, L.P. v. Texas Utilities Electric Company, Declaratory Ruling and Order, P.A. No. 96-002, DA 97-1527, rel. July 21, 1997, nondiscriminatory access means access without unreasonable terms and conditions. The Commission should confirm that the requirement of nondiscriminatory access prohibits a utility from offering pole attachments on more favorable rates, terms and conditions to entities which are in a business relationship with the utility and are offering telecommunications services than those offered to cable systems.

[9] 47 U.S.C. § 224(d)(3).

[10] 47 U.S.C. § 224(e)(1). 47 U.S.C. § 224(d)(3) also indicates that Section 224(e) applies to cable television systems providing any telecommunications service. Also see, Conference Report on S.652 at 206.

[11] 47 U.S.C. § 224 appears to limit the holding of Heritage in situations involving telecommunications services. See Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co., 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192, aff'd sub nom. Texas Utils. Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

[12] Notice ¶ 13.

Commission should confirm that utilities providing pole attachments to cable operators providing Internet access service in addition to traditional video programming service must do so at rates which comply with Section 224(d) of the Act.

III. THE COMMISSION'S CABLE FORMULA FOR ASSIGNING THE COSTS OF USABLE SPACE IS EQUALLY APPLICABLE TO TELECOMMUNICATIONS CARRIERS

Section 224(e)(3) requires that the cost of providing usable space be apportioned among all entities on the basis of the amount of space used by each entity.[13] The Commission proposes to satisfy this statutory requirement by using the same formula that is currently employed to determine cable pole attachment rates, but limiting it to costs associated with usable space (i.e., rather than the full cost of a pole). This is a reasonable approach which builds on the Commission's previous cable pole attachment decisions. In order to be consistent with these decisions, U S WEST believes that net book costs should be used in calculating maximum pole attachment rates.

U S WEST also supports the continued use of the presumption that an attacher uses one foot of usable space on a pole (i.e., for telecommunications purposes). With respect to conduit, U S WEST believes that the use of a 1/3 duct presumption is a more accurate representation of existing industry practices where three 1 ½ inch inner ducts are normally placed in a four-inch duct.[14]

In its earlier comments in CS Docket No. 97-98, U S WEST urged the

[13] 47 U.S.C. § 224(e)(3).

[14] See Attachment 2 at 10.

Commission to adopt a conduit methodology that recognizes geographic cost variations in conduit systems.[15] U S WEST recommended that the Commission modify its pole attachment formula to incorporate the equivalent of a "zone density pricing" approach for conduit which would reflect differences in conduit costs between very expensive downtown areas, other urban/suburban areas and rural areas. The conduit facilities which are the subject of this proceeding are exactly the same facilities which were the subject of the cable proceeding. As such, U S WEST stands by its earlier recommendation on geographic cost differentials and proposes the same approach for determining the cost of usable (and nonusable) conduit space for telecommunications carriers.

IV. SECTION 224(e)(2) DOES NOT ALLOW THE COMMISSION TO APPORTION NONUSABLE SPACE ON THE BASIS OF THE AMOUNT OF USABLE SPACE OCCUPIED BY AN ATTACHING ENTITY

Section 224(e)(2) requires that two-thirds of the cost of providing the nonusable space of a pole or conduit be equally apportioned among attaching entities.[16] Thus, the remaining one-third of the cost of nonusable space remains with the pole or conduit owner.

The Commission tentatively concludes that where a utility pole owner provides telecommunications service it should be counted as an attaching entity for

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[15] Id. at 9-10.

[16] 47 U.S.C. § 224(e)(2) states: A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

purposes of allocating the costs of unusable space.[17] This is a reasonable conclusion and in accord with the language of the statute. Next, the Commission tentatively concludes that incumbent LECs are attaching entities for purposes of assigning nonusable space under Section 224(e)(2) even though incumbent LECs are excluded from the definition of the term "telecommunications carrier" under Section 224.[18] This is also a reasonable conclusion because Section 224(e)(2) refers to "attaching entities" not to telecommunications carriers.[19] Furthermore, the "term pole attachment" includes any attachment by a "provider of telecommunications service," not just telecommunications carriers as defined in Section 224.[20]

The Commission then seeks comment on the "general premise" that "counts any telecommunications carrier [presumably including incumbent LECs] as a separate attaching entity for each foot, or partial increment of a foot, it occupies on the pole."[21] This premise finds no support in either the language of the statute or its legislative history. If adopted, this premise would effectively assign the costs of nonusable space on the basis of the proportion of usable space occupied by an attaching entity. Such an interpretation cannot be reconciled with the language of the statute and would effectively negate Section 224(e)(2). Congress would have

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[17] Notice ¶ 22.

[18] Id. ¶ 23.

[19] It is not reasonable to assume that Congress intended for non-incumbent LEC telecommunications carriers to pay two-thirds of the cost of nonusable space where there is only one other attaching entity.

[20] 47 U.S.C. § 224(a)(4).

[21] Notice ¶ 23. Also see, id. ¶ 41, where the Commission states, "we believe that each entity using one-half duct be counted as a separate attaching entity."

had no need to distinguish between the apportionment of costs of usable and nonusable space in Sections 224(e)(2) and (e)(3) if it had intended that all costs be apportioned on the basis of the amount of usable space occupied by an attaching entity. There is no doubt that Congress intended to treat the apportionment of the costs of usable and nonusable space differently as the legislative history clearly states:

> The new provision directs the Commission to regulate pole attachment rates based on a "fully allocated cost" formula. In prescribing pole attachment rates, the Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and . . . [22]

There is a subtle, but significant, difference between the language of Section 224(e)(2) of the statute and the language in the Conference Report. The statute speaks of "equal apportionment of such costs [nonusable space] among all attaching entities" while the legislative history states that nonusable costs should be apportioned "equally among all attachments." If the costs of nonusable space are assigned in accordance with the literal words of the statute (i.e., equal apportionment . . . among all attaching entities"), the cost assignment would differ from what it would be under the Conference Report except in those instances where each attaching entity only had a single attachment for telcommunications service.

[22] Conference Report on S.652 at 206.

Clearly, if the statutory language is found to be "unambiguous,"[23] the only possible interpretation of Section 224(e)(2) is that an attaching entity is only counted once for purposes assigning the costs of nonusable space regardless of how many attachments an entity may have on a pole or in a conduit. This does not appear to be a reasonable approach to assigning such costs -- given that all attachments benefit equally from the existence of nonusable space.

It is U S WEST's opinion that the term "equal apportionment of such costs among all attaching entities" is ambiguous since there are many possible ways of "equally apportioning" the costs of nonusable space among attaching entities -- the most logical of which is to assign these costs equally among all attachments. This would also be in accord with the intent of Congress, as reflected in the Conference Report, and would recognize that all attachments benefit equally from nonusable space.[24] As such, U S WEST recommends that the Commission adopt rules requiring that the costs of nonusable pole and conduit space be assigned among entities on the basis of the number of attachments.[25] No other interpretation of this

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[23] If a statute is unambiguous, the Commission has no role other than to implement the plain meaning of the statute. If a statute is ambiguous, the statute should be interpreted in such a way to give meaning to all provisions, if at all possible.

[24] "Congressional enactments should be read as rational, coherent and purposeful elaborations of legislative policy." Lee Fook Chuey v. INS, 439 F.2d 244, 249 (9th Cir. 1970).

[25] U S WEST also supports the use of rebuttable presumptions as to the number of attachments on a pole or in a conduit in assigning the costs of nonusable space. U S WEST believes that different presumptions should be used for urban, suburban and rural areas. U S WEST also believes that efficiency would be best served by using nationwide rebuttable presumptions rather than having individual companies develop presumptions. Such an approach should minimize the number of complaints and place the burden of rebutting a presumption on the facility owner, the party best positioned to bear it.

Section comports with both the language of the statute and Congressional intent.[26]

V. OVERLASHING IS AN ACCEPTABLE PRACTICE WHEN PERFORMED IN CONFORMANCE WITH ACCEPTED INDUSTRY ENGINEERING AND SAFETY STANDARDS

As the owner of more than one million poles, U S WEST Communications permits overlashing. Overlashing is a reasonable practice when done in accordance with engineering and safety standards. Overlashing that would endanger the integrity of a pole line or create a hazardous condition is not permitted by U S WEST. The type of service that is to be provided on overlashed facilities is irrelevant and should play no role in determining whether overlashing of facilities is permitted. Engineering and safety standards should be the only element considered in permitting an attaching entity to overlash its own facilities.[27]

However, U S WEST does not believe that overlashing of existing facilities by unrelated third parties is a reasonable practice. If an unrelated third party wishes to attach its facilities to a utility's poles, it should be required to deal directly with the utility and to adhere to the same terms and conditions as any other attaching entity.

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[26] Clearly, under Chevron, the Commission may adopt such rules given the ambiguity of the statutory language. Chevron, U.S.A. Inc. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2780 (1984).

[27] This is no way implies that wireless carriers have a right to attach antennas and other facilities to utility poles under existing law. See Attachment 2 at 10-12.

VI. RIGHT-OF-WAY COMPLAINTS SHOULD BE ADDRESSED ON A CASE-BY-CASE BASIS

In addition to addressing pole attachment issues in its Notice, the Commission also seeks comment on the frequency and circumstances under which right-of-way issues will arise and whether the Commission should adopt a methodology or formula to determine just and reasonable rates for rights-of-way.[28]

With respect to the Commission's first inquiry, U S WEST's experience has been that right-of-way issues primarily arise in combination with other pole attachment issues. While there are many instances where telephone companies, cable companies and electric utilities share the same utility easement in a private development or on public land, in most instances the parties acquire their own right-of-way from landowners or the appropriate public agency. This is true even in those cases where the various utilities have entered into joint trench agreements.

As a result, U S WEST has limited experience with issues arising out of requests for access solely to rights-of-way or with subleases of such rights-of-way. Given the wide variety of state statutes and local ordinances governing the use of both public and private rights-of-way, it is difficult to anticipate the types of issues that might arise between utilities that hold easements and potential sublessees. As a result, U S WEST is opposed to the adoption of more specific rules on rights-of-way. Adoption of specific right-of-way rules at this time would be counterproductive. Neither the Commission, utilities, nor potential right-of-way users has a clear idea of the types of problems that might arise with respect to use

[28] Notice ¶¶ 42-43.

of utility rights-of-way. It makes no sense to attempt to formulate rules in such an uncertain environment where the Commission's jurisdiction has not been clearly defined and is limited by state law.[29] It is best to wait and see what types of right-of-way issues arise, if any, and adopt whatever rules are necessary at that time in conformance with existing state law.

As to the Commission's inquiry on the appropriateness of adopting a uniform methodology or formula for determining just and reasonable right-of-way rates, U S WEST is of the opinion that it would be unwise for the Commission to do so. The price and circumstances under which right-of-way is acquired vary enormously. It is hard to envision that the Commission or any other governmental agency could develop a uniform methodology or formula that could be used to determine maximum rates for right-of-way throughout an individual state, let alone the entire country. As such, complaints as to the reasonableness of rates for the use of utility right-of-way should be handled on a case-by-case basis.

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[29] Despite any uncertainty as to the limits of the Commission's jurisdiction over utility rights-of-way, it is U S WEST's opinion that the Commission may not lawfully require a utility to acquire right-of-way for the benefit of a third party when the utility has no need for additional right-of-way and, furthermore, if a utility has a permit or easement that is restricted solely to its own use of the right-of-way in question, the utility has no right to grant access to a third party without the property owners' consent. See U S WEST Comments, CC Docket No. 96-98, filed May 20, 1996 at 16-17 and U S WEST Reply Comments, CC Docket No. 96-98, filed June 3, 1996 at 5-6. However, it is recognized law that cable operators have a right of access to both public rights-of-way and private easements which have been dedicated for compatible uses within their franchise areas. See 47 U.S.C. § 541(a)(2).

VII. CONCLUSION

U S WEST urges the Commission to implement Section 224(e) of the 1996 Act in accordance with the foregoing comments.

Respectfully submitted,

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September 26, 1997

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Rules and Policies	)	CS Docket No. 97-98
Governing Pole Attachments	)	

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), hereby responds to the Federal Communications Commission's ("Commission") Notice of Proposed Rule Making which requested comment on proposed changes in the Commission's rules governing the rates that utilities may charge for pole and conduit attachments.[1]

I. INTRODUCTION AND SUMMARY

U S WEST finds itself in a unique position — not only is one of its subsidiaries, U S WEST Communications, Inc., one of the largest local exchange carriers ("LEC") but another subsidiary, MediaOne,[2] is the third largest cable company in the United States. As such, U S WEST is both a large lessor and lessee of poles. U S WEST will be harmed by any rule changes which unduly favor either the interests of pole owners or renters. Just and reasonable pole attachment rates

[1] In the Matter of Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rule Making, FCC 97-94, rel. Mar. 14, 1997 ("Notice").

[2] MediaOne formerly did business as Continental Cablevision.

are as important to cable companies today, as they were in 1978 when the Pole Attachment Act was first adopted.[3]

In this proceeding, the Commission proposes to further refine its existing cable pole attachment formula to address concerns raised in the Southwestern Bell Telephone Company ("Southwestern Bell") Petition[4] and a Whitepaper filed recently by a group of electric utilities ("Electric Utilities").[5] The Commission should reject the proposed modifications to the pole attachment formula contained in the Electric Utilities' Whitepaper. As shown below, these proposed modifications are inconsistent with U S WEST's own experience, not to mention the National Electric Safety Code ("NESC"). The Commission should continue to employ the use of net book costs in calculating pole attachment rates with one modification — to remove the effect of negative net salvage which Southwestern Bell identified in its Petition.

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[3] In its Notice, the Commission also proposes a conduit methodology to determine the maximum rates that utilities may charge cable companies for the use of conduit. These same rates will be available for telecommunications carriers until the Commission adopts a separate formula for telecommunications carriers some time on or before February 8, 1998, as required by Section 224(e). 47 U.S.C. § 224(e). Given the minimal use of conduit by cable companies at the present, U S WEST believes that the Commission should address the issue of conduit rates for cable companies in its upcoming proceeding to determine just and reasonable pole and conduit rates for telecommunications carriers.

[4] Petition for Clarification, or in the Alternative, a Waiver of Southwestern Bell Telephone Company, filed Aug. 26, 1994 ("Petition").

[5] Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective, A Position Paper Presented by : American Electric Power Service Corp. et al., prepared by: McDermott, Will & Emery, Aug. 28, 1996.

II. ELECTRIC UTILITIES' ASSERTIONS ON THE AMOUNT OF USABLE POLE SPACE ARE NOT SUPPORTED BY U S WEST'S EXPERIENCE

The current formula for determining the maximum cable attachment rate is as follows:

$$\text{Maximum Rate} = \frac{\frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Carrying Charge Rate} \times \text{Net Pole Investment} \times .95^{6}}{\text{Total \# of Poles}}$$

In the Commission's formula, the proportion of usable space assigned to cable companies is determined by dividing the space allocated for cable attachments (i.e., one foot)[7] by the total amount of usable space. Currently, it is presumed[8] that utility poles have an average height of 37.5 feet with an average of 13.5 feet being usable space.[9] The Whitepaper argues that the average height of poles used for multiple attachments has increased to 40 feet due to the installation of larger poles and the fact that 30 foot poles are rarely used for cable attachments.[10] As such, the Electric Utilities propose that the average height of poles for calculating pole attachment rates be increased to 40 feet. U S WEST disagrees. While 40 feet is the height of the standard size pole that U S WEST Communications, Inc. uses when it replaces existing poles or installs new poles, the average height of U S WEST's

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[6] This factor would be .85 in the case of power poles. See Notice ¶ 10.

[7] Id. ¶ 7. See also, In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 69-70 ¶¶ 21-22 (1979) ("Second Report and Order").

[8] U S WEST supports the continued use of rebuttable presumptions in calculating the maximum rate for cable company pole attachments for reasons of administrative efficiency.

[9] Notice ¶ 7. And see, Second Report and Order, 72 FCC 2d at 69 ¶ 21.

[10] Whitepaper at 9-10.

poles is approximately 38 feet. As a result, U S WEST believes that the Commission should continue to presume that the average height of a utility pole is 37.5 feet.

U S WEST also disagrees with Electric Utilities' claim that 30 foot poles are rarely used for cable attachments and their suggestion that 30 foot poles be eliminated from pole attachment rate calculations.[11] A review of U S WEST Communications, Inc.'s pole inventory does not support the Electric Utilities' claims. Attachment 1 shows that approximately 13 percent of U S WEST Communications, Inc.'s poles are 30 feet or less in height. Attachment 2 demonstrates that there is no basis for the claim that poles of 30 feet or less will not support multiple attachments.[12] On the basis of this data, U S WEST cannot support a methodology which would remove 30 foot poles from pole attachment rate calculations. Such an approach is not consistent with U S WEST Communications, Inc.'s experience and would unduly raise maximum pole attachment rates when there is no justifiable financial reason for doing so.

The Electric Utilities' claim that the amount of usable space on utility poles has decreased to 11 feet cannot be sustained if poles of 30 feet or less continue to be included in pole attachment calculations and the average pole height remains at 37.5 feet. On the other hand, U S WEST believes that the 40 inch NESC separation

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[11] Id. at 8.

[12] In fact, Attachment 2 shows that U S WEST's poles which are 25 feet or less in height are more likely to have two or more attachments than taller poles.

requirement is properly assigned to electric utilities as usable space. In the absence of electric facilities, this space would be usable by other attachers.[13]

In summary, the Commission should leave unchanged at 7.4 percent (i.e., 1/13.5) the amount of usable space assigned to cable company pole attachments.[14]

III. THE COMMISSION SHOULD MODIFY THE POLE ATTACHMENT FORMULA TO REMOVE THE EFFECTS OF NEGATIVE NET SALVAGE

The Commission also seeks comment on the problem which Southwestern Bell first brought to its attention in its 1994 Petition for Clarification.[15] In that Petition, Southwestern Bell asked the Commission to modify its pole attachment formula to eliminate the possibility of using a negative value for the net cost of a bare pole (which could result in negative pole attachment rates).[16] Southwestern Bell pointed out that this anomalous situation arose because the cost of pole removal exceeded salvage value (i.e., negative net salvage) and that under certain circumstances the depreciation reserve exceeded gross pole investment. U S WEST Communications, Inc. supported Southwestern Bell's Petition and noted that U S WEST was experiencing a similar situation in some states which it served.[17]

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[13] Furthermore, this space is frequently used for street lighting purposes — a use that is clearly associated with the provision of electrical power.

[14] Contrary to the assertions of the Electric Utilities, rather than increasing the cost assignment to cable companies, U S WEST's data and experience would support a slightly lower cost assignment.

[15] See note 4, supra.

[16] Petition at 3-4.

[17] See Comments of U S WEST Communications, Inc., filed Dec. 12, 1994, AAD 94-125. Currently, U S WEST Communications, Inc.'s accumulated depreciation reserve exceeds its gross pole investment in five states — Iowa, Nebraska, Minnesota, North Dakota, and South Dakota. See Attachment 3.

Southwestern Bell's proposed solution to the problem was to exclude net salvage from the depreciation reserve for purposes of calculating the net cost of a bare pole.[18]

In its Notice, the Commission seeks comment on the magnitude of the problem and on its proposed solution which differs from that proposed by Southwestern Bell.[19] Attachment 3 contains state-specific data on U S WEST Communications, Inc.'s poles. This Attachment demonstrates that the accumulated depreciation reserve exceeds the original cost of poles in five U S WEST states — thereby resulting in a negative net cost of a bare pole. In three other U S WEST states, the net cost of a bare pole is very close to zero and is expected to turn negative in the near future. These states are Idaho, Wyoming and Montana. Clearly, the negative net salvage problem is not a quirk but a continuing problem which should be resolved at the earliest possible date, preferably in this proceeding.

Under the Commission's formula, negative net pole costs may result in negative pole attachment rates. U S WEST does not believe that it is appropriate to have negative pole attachment rates even if the accumulated depreciation exceeds gross pole investment. Furthermore, U S WEST believes that the cost of pole removal is a bona fide cost associated with providing poles and that all pole users should share in covering this cost.

The Commission proposes to resolve the negative net salvage and negative net cost of poles problem by removing net salvage when the net value of poles

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[18] Petition at 3-4.

[19] Notice ¶ 21.

becomes negative. U S WEST supports the Commission's approach as a reasonable middle ground even though it will result in some unexpected fluctuations in rates in the year that the accumulated depreciation reserve exceeds gross plant investment in poles.[20]

IV. PRIVATE CONTRACTS SHOULD CONTINUE TO BE THE BASIS FOR POLE RENTAL ARRANGEMENTS

Traditionally, pole attachment rates have been negotiated between the parties (i.e., telephone companies, cable companies and electric utilities) and governed by individual contracts. Under the 1978 Pole Attachment Act, cable companies could file complaints with the Commission if they believed that they were being charged unreasonable rates or subjected to unreasonable terms and conditions.[21] The Commission only became involved if the parties could not agree

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[20] U S WEST believes that, in calculating pole attachment rates, adjustments in accumulated depreciation associated with negative net salvage should also include a corresponding adjustment to deferred tax reserves. Commission rules require deferred tax reserves to be adjusted when an adjustment to the accumulated depreciation reserve is made for cost of removal. Part 32 rules require that deferred tax reserves (liabilities or assets) be recognized for all book/tax temporary differences. Book/tax temporary differences arise when items of income or expense are reported in different periods for tax versus the regulated books of accounts.

The cost of removal of property, plant and equipment creates a book-tax temporary difference. The cost of removal is recognized in the regulated books of accounts over the book life of the plant prior to retirement or sale by including it in the book depreciation rate. For tax purposes, the cost of removal is recognized at the time of retirement or sale. In effect, the deferred tax reserve associated with the cost of removal builds up over the life of the plant and reverses upon the retirement or sale of the plant. As such, it is appropriate to include a corresponding adjustment to deferred tax reserves if an adjustment is made to the accumulated depreciation reserve to remove the effects of negative net salvage.

[21] The 1978 Pole Attachment Act only gave the Commission authority over pole attachment disputes in those states which had not adopted state pole attachments acts. 47 U.S.C. § 224.(c)(1).

on pole attachment rates, terms and conditions and the disagreement resulted in a complaint. This remains unchanged with the passage of the 1996 Act. As such, the Commission should do nothing in this or any subsequent pole attachment proceeding to upset the balance between privately negotiated agreements and Commission dispute resolution (i.e., the Commission's complaint process).[22]

V. CONCLUSION

U S WEST's pole data and experience demonstrate that the Commission's current presumptions on the amount of usable pole space and percentage of space assigned to cable companies should remain unchanged at 13.5 feet and 7.4 percent, respectively. U S WEST's data also confirms that the current pole attachment formula needs to be modified to remove the effects of negative net salvage.

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[22] Assuming that there are no disputes between the parties to a pole attachment agreement, the Commission should have no role other than to ensure that similarly-situated parties have the same opportunity to enter into equivalent agreements with utilities.

ATTACHMENT 1

Pole Height for

U S WEST Communications 100% Owned Poles

	Percent of Total*
25′ & Under	2.17%
30′	10.59%
35′	28.47%
40′	45.53%
45′	10.56%
50′	2.14%
55′ & over	0.55%
	100.00%

*This distribution by height of poles is an estimate based on actual data from 9 of the 14 states served by U S WEST Communications.